Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of **Petition for Declaratory Ruling that USA Datanet Corp. Is Liable for Originating Interstate Access Charges When it uses Feature Group A Dialing to Originate Long Distance Calls**	**WC Docket No. 05-276**

REPLY COMMENTS OF USA DATANET CORP.

USA Datanet Corp. ("USA Datanet"), by its undersigned counsel and pursuant to the Commission's December 9, 2005, Public Notice,[1] hereby replies to comments filed in response to the above-captioned Petition for Declaratory Ruling ("Petition") filed with the Federal Communications Commission ("Commission") by Frontier Telephone of Rochester, Inc. ("Frontier") on November 22, 2005. As USA Datanet explained in its initial comments, the Petition fails to provide the factual basis on which the Commission could resolve the dispute Frontier has with USA Datanet, and this fatal deficiency cannot be remedied through the comments of third parties or in any reply comments filed by Frontier, PAETEC, or even USA Datanet.

The comments filed in response to Frontier's Petition demonstrate precisely why it is inappropriate and impermissible for Frontier to seek, or the Commission to entertain,

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[1] Public Notice, WC Docket No. 05-276, DA 05-3165 (released Dec. 9, 2005).

resolution of a fact-intensive carrier-specific tariff dispute through the declaratory ruling process, particularly where the petitioner is already seeking the same relief in federal court. The vast majority of comments filed in support of the Frontier Petition focus generally on whether the type of services USA Datanet provides are similar to the services at issue in the AT&T IP-In-The-Middle decision.[2] However, a ruling upon whether USA Datanet's services are similar to AT&T's IP-In-The-Middle services, whether by the FCC or the United States District Court for the Western District of New York, *would not resolve the dispute between Frontier and USA Datanet*. Moreover, all of the comments filed in support of Frontier's Petition are entirely devoid of factual support,[3] which is to be expected since only USA Datanet, Frontier and PAETEC have any knowledge of relevant facts. The comments are replete with inaccuracies, and they reflect the efforts of third parties to use the dispute to advance their political and general goals rather than helping to resolve the tariff dispute between Frontier and USA Datanet based upon current law applied to specific facts. Indeed, none of the comments cite a single provision

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2 *See generally* Comments of AT&T, Inc. at 10-12; Comments of BellSouth Corp. at 2-7; Comments of CenturyTel, Inc. at 6-8; Comments of the New Jersey Division of the Ratepayer Advocate at 8; Comments of the New York State Telecommunications Association, Inc. at 3-4; Comments of Qwest Communications International, Inc. at 2-5; Comments of the United States Telephone Association at 12-14; Comments of the Verizon Telephone Companies at 2-4; and Joint Comments of the Independent Telephone and Telecommunications Alliance, National Exchange Carrier Association, Inc., National Telecommunications Cooperative Association, Organization for the Promotion and Advancement of Small Telecommunications Companies, United States Telecom Association, and the Western Telecommunications Alliance ("Joint ILEC Comments") at 2.

3 *See generally* Comments of AT&T, Inc.; Comments of BellSouth Corp.; Comments of CenturyTel, Inc.; Comments of the New York State Telecommunications Association, Inc.; Comments of Qwest Communications International, Inc.; Comments of the United States Telephone Association; Comments of the Verizon Telephone Companies; and Joint ILEC Comments.

of Frontier's tariff,[4] which is remarkable since the relief Frontier has requested is to find its tariff provisions applicable to USA Datanet. In short, like the petition itself,[5] none of the comments filed in response to Frontier's Petition contain any record evidence upon which the Commission could rely to resolve the dispute between Frontier and USA Datanet, which is the ruling Frontier requests.

Although the relevant issues have yet to be briefed before the federal district court or the Commission, and the current declaratory ruling proceeding does not provide for the type of discovery and briefing necessary to resolve the dispute, USA Datanet submits these reply comments to clarify some, but not all, of the fallacies set forth in the initial comments. First, USA Datanet has never suggested that the Commission cannot or should not resolve the tariff dispute, provided that the correct procedural vehicle is used. USA Datanet, not Frontier, filed a

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4 Frontier, like the parties who filed comments in support of Frontier, focuses solely upon comparing USA Datanet's services to the services at issue in the AT&T IP-In-The-Middle Decision, presumably because Frontier does not want the federal district court or the Commission to analyze the relevant facts in this case (*e.g.*, whether Frontier has the right to collect the charges it seeks to impose because Frontier ordered, or constructively ordered, services from a valid and applicable Frontier tariff). Even if USA Datanet's services were identical to the services at issue in the AT&T IP-In-The-Middle Decision, and they are not, Frontier would not have the right to collect the charges it seeks to collect from USA Datanet because USA Datanet has not ordered, directly or constructively, any services from any valid and applicable Frontier tariff.

5 As USA Datanet explained in its initial comments, resolution of the Petition would require an interpretation of specific provisions in Frontier's tariff and the assessment whether they apply to USA Datanet. Notably, although the Petition talks generally about the Feature Group A rate elements purportedly in its tariff, Frontier fails to identify the applicable tariff provisions or attach them. *See* Petition at 3. This is not surprising given that, under Frontier's tariff, every Feature Group A access charge customer is to receive a seven-digit telephone number. [Frontier Telephone Co.] (Tariff FCC No. 1 Original page 6-39, Section 6.2.1 Feature Group A, (A) Description . . . (4) "A seven digit local telephone number assigned by the Telephone Company is provided for access to FGA switching in the originating direction. The seven digit local telephone number will be associated with the selected end office switch and is of the form NXX-XXXX.") Frontier

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motion for primary jurisdiction referral to the Commission, which Frontier vigorously opposed. Indeed, USA Datanet's motion before the District Court made clear that USA Datanet believes the Commission should resolve the dispute between Frontier and USA Datanet, but the Commission should cannot do so when Frontier's lawsuit remains pending before the District Court. Moreover, even if Frontier's federal lawsuit did not create a bar to proceeding before the Commissions, the agency should not resolve the dispute by addressing Frontier's misleading, incomplete and fatally flawed petition for declaratory ruling. Rather, were the Commission free to entertain Frontier's Petition, the agency should resolve the dispute between Frontier and USA Datanet only after providing for adequate discovery and briefing of the relevant issues, which can only be provided as part of the Commission's formal complaint process.

In point of fact, however, the federal district court unambiguously denied USA Datanet's motion, despite Frontier's claims to the contrary.[6] The parties must now move forward in light of the District Court's decision. If Frontier was displeased with the Court's ruling, Frontier should have appealed the ruling or voluntarily withdrawn its federal lawsuit so that it could file a formal complaint against USA Datanet before the Commission. Instead, as detailed in USA Datanet's opening comments, Frontier violated Section 207 of the Act by seeking the same remedy from the Commission that it currently is seeking in federal district court in a transparent effort impermissibly to increase the litigation costs of USA Datanet and further

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has never provided USA Datanet with a local telephone number, which is fundamentally inconsistent with its assertion that USA Datanet is a Feature Group A customer.

6 If the Court had granted USA Datanet's petition for primary jurisdiction referral, the Court would have directed the parties to bring specific issues to the Commission, and the Court would have provided the parties with the discovery and briefing necessary to resolve the dispute based upon a fully developed record.

Frontier's general political goals.[7] Accordingly, contrary to the bombastic and inaccurate rhetoric of some commenters,[8] the only party who is flagrantly disregarding the applicable legal authorities and engaging in procedural improprieties is Frontier.

Second, PAETEC's comments make clear why the Commission should not wade into the factually-dense litigation currently pending in federal court absent a specific primary jurisdiction referral by the District Court, or, alternatively, a decision by Frontier both to withdraw its pending federal lawsuit and to file a formal complaint before the Commission.[9] Specifically, for the first time in any publicly filed document or in any communication to USA Datanet, PAETEC claimed in its comments that it is providing joint access with Frontier to USA Datanet, which is particularly remarkable since PAETEC has been providing service to USA Datanet for over 6 years and has been well aware of the pending litigation. PAETEC failed to provide any support whatsoever, or even cite any tariff or contractual provisions, for its false claim that it is providing joint access with Frontier to USA Datanet. PAETEC's comments are merely a self-serving attempt to curry favor with Frontier and avoid implicating itself in the dispute.

Ironically, PAETEC's comments demonstrate that Frontier does not provide any Feature Group A services described in any of Frontier's tariffs. Specifically, PAETEC stated in its comments that:

> Typically, the ILEC provides the access tandem services, but there is nothing to prevent a role reversal like that between PAETEC and Frontier, where PAETEC

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7 *See, e.g., Petition for Declaratory Ruling that MCI, Inc. is Liable for Intrastate Access Charges Upon Its Long Distance Intrastate Prepaid Calling Card Traffic*, filed by Frontier Communications on December 1, 2005.

8 *See, e.g.*, USTA Comments at 1-15.

9 *See, e.g.*, PAETEC's Comments at 1-2.

> provides the point of switching closest to the IXC, and Frontier serves the end user placing or receiving the long distance call.[10]

If Frontier had actually tariffed the "non-standard" service PAETEC describes, Frontier would have the right to seek payment pursuant to the tariff from any party who ordered, or constructively ordered, the "non-standard" service from Frontier. However, Frontier has never tariffed the "non-standard" service PAETEC describes. Accordingly, Frontier does not have the right to impose access charges for that "non-standard" service from any party, let alone USA Datanet, particularly when Frontier and USA Datanet have no contractual relationship. Although the Commission should not reach the merits of Frontier's Petition for the reasons set forth here and in the initial comments of Earthlink, the VON Coalition and USA Datanet, PAETEC's comments illustrate one of the reasons why Frontier has no right to seek access charges from USA Datanet pursuant to any of Frontier's tariffs, despite Frontier's claims to the contrary.[11]

In any event, in light of the contentions PAETEC made in its comments, the dispute between Frontier and USA Datanet cannot be resolved without discovery and briefing regarding PAETEC's involvement in the exchange of traffic between USA Datanet and PAETEC, and between PAETEC and Frontier. Accordingly, if and when the District Court lifts the stay of Frontier's lawsuit, PAETEC will have to be joined to the litigation as an indispensable party,[12] which further demonstrates why the Commission should not, and legally cannot, reach the merits of Frontier's Petition at this time.

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10 *See id.* at 2.

11 *See generally* Comments of Earthlink; Comments of The VON Coalition; Comments of USA Datanet.

12 *See* Fed. R. Civ. P. 19. *See also, e.g., Legal Aid Society v. City of New York*, 114 F. Supp. 2d 204, 219 (SDNY 2000) (noting that defense of failure to join indispensable party may be raised through end of trial).

Although USA Datanet believes the Commission can and should provide the industry with clarity regarding the regulatory framework for IP-enabled services, it does not need to – and should not – address Frontier's petition in order to do so. Rather, the Commission can and should issue generally applicable rulings in response to the pending Vartec Petition and the *IP-Enabled Services* NPRM, as the District Court anticipated when it stayed Frontier's lawsuit.

CONCLUSION

In sum, as set forth in USA Datanet's initial comments, the Commission should reject the Petition without consideration of the merits since the agency should not, and indeed legally cannot, undermine the District Court decision by ruling on Frontier's Petition. Frontier will suffer no prejudice due to a refusal to reach the merits of its Petition. The District Court concluded that, "it does not appear that some additional delay will harm Frontier, since Frontier is only now pursuing claims that date back to 1999."[13] Those claims are now lodged with the District Court, where they will remain for adjudication once the purpose of the Court's stay is satisfied – that is, once the Commission decides the pending *IP-Enabled Services* and *VarTec* matters, at which time the District Court can determine the best means for moving forward with Frontier's lawsuit. The Commission, therefore, should have no reservation about complying with the mandate in Section 207 to dismiss the Petition.

In the alternative, assuming *arguendo* that Section 207 does not act as a bar, the Commission should decline to reach the Petition on the merits and clarify that tariff disputes and requests for orders requiring the payment of access charges by specific parties pursuant to

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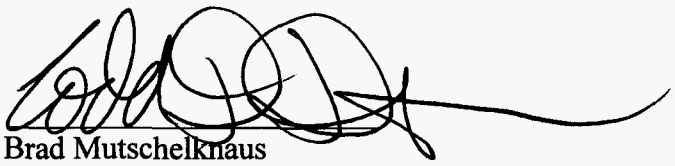
[13] *Order* at 13.

specific tariffs, such as the Petition raises, are not the proper subject of declaratory ruling proceedings.

Respectfully submitted,

By: 

Brad Mutschelknaus
Edward A. Yorkgitis, Jr.
Todd D. Daubert
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W., Suite 500
Washington, D.C. 20036
Telephone: (202) 955-9600
Facsimile: (202) 955-9792
Counsel for USA Datanet Corp.

Dated: January 24, 2006

Certificate of Service

I, Tara Keilberg, hereby certify on this 24th day of January 2006, that the foregoing Reply Comments of USA Datanet Corp. was served via email on the following persons:

Kenneth F. Mason
Gregg C. Sayre
Frontier Communications
180 South Clinton Avenue
Rochester, NY 14646-0700

Thomas Navin, Bureau Chief
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Tamara Preiss, Division Chief,
Pricing Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Steve Morris, Deputy Division Chief
Pricing Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Deena Shetler, Deputy Division Chief
Pricing Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Jennifer McKee, Acting Deputy Division Chief
Pricing Policy Division,
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Anthony DeLaurentis
Enforcement Bureau
Federal Communication Commission
445 12th Street, SW
Washington, DC 20054

Best Copy and Printing
Portals II
445 12th St. S.W.
Room CY-B402
Washington DC 20554

Tara Keilberg

Tara Keilberg